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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

BIG D ENTERPRISES, INC. and
DR. EDWIN G. DOOLEY,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

James B. Pierce, Esq.
Counsel of Record
Post Office Box 1604
Fort Smith, Arkansas 72902
Telephone (501)785-5313

Edwin G. Dooley, Jr., Esq.
Post Office Box 1604
Fort Smith, Arkansas 72902
Telephone (501)785-5313
Attorneys for Petitioners

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QUESTIONS PRESENTED

1. Is housing discrimination so inherently reprehensible that no punitive damage award based thereupon can ever violate the Constitutional Fifth Amendment guarantees of due process of law?

2. Must a defendant engage in the cumulative procedure of recalling the same witnesses to adduce on direct examination the same evidence that was adduced on cross examination in order to receive a mixed motive jury instruction in a discrimination case?

3. Does state common law control the assessment of punitive damages available under federal acts that specifically omit a federal procedure for the assessment of such damages?

PARTIES TO THE PROCEEDING

Petitioners

Dr. Edwin G. Dooley of Fort Smith, Arkansas, and Big D Enterprises, Inc., an Arkansas corporation wholly owned by Dr. Edwin G. Dooley. Big D Enterprises, Inc., has no parent corporations or wholly or nonwholly owned subsidiaries.

Respondents

The United States of America, on behalf of Cynthia Williams, a resident of Fort Smith, Arkansas, last known, and Richard Batts and Janet Poole, residents of Fort Smith, Arkansas, last known.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 184 F.3d 924 (8th Cir. 1999) and is included in the Appendix at a1. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioners Petition for Rehearing is not reported. A copy of that order is included in the Appendix at a28.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on July 9, 1999. On August 23, 1999, Petitioners petitioned for rehearing. On September 10, 1999, the Eighth Circuit Court of Appeals denied the Petition for Rehearing en Banc and denied the Petition for Rehearing by the Panel. A copy of that order is included in the Appendix at A|. This Petition for Writ of Certiorari is filed within ninety (90) days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

RULE 29.4 CERTIFICATE OF NOTIFICATION

Three true and correct copies of this Petition for Writ of Certiorari have been served upon the Solicitor

General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001, as required by Supreme Court Rule 29.4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment 5
Due Process of Law and Just Compensation Clause

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Enforcement of Fair Housing Act by Attorney General
Relief which may be granted in civil actions

42 U. S. C. § 3614 (d)(1)(B)

(1) In a civil action under subsection (a) or (b) of this section, the court -

(B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved.

FEDERAL RULE OF EVIDENCE
Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

The case below was a housing discrimination case concerning the rental of one apartment unit, brought by the government under the jurisdiction of the Fair Housing Act, 42 U.S.C. §§ 3601, et. seq.

Three former apartment managers and a small

handful of former office staff who had no capacity to actually rent apartments, testified they had heard or been told that African-Americans were not to be rented to, and in the instance of the apartment managers, that the managers had discriminated against African-Americans. Petitioners were not allowed to challenge this assertion by presentation of evidence that the government had conducted an investigation using a printed pamphlet offering the potential for money damages and a toll free number searching for "aggrieved persons" and that not one had been found. Although the government was permitted to ask about other discrimination complaints against Petitioners, Petitioners were barred from presentation of evidence that another HUD investigation merely a few months after the first complaint found Petitioners had not discriminated in their apartment rentals. The poisonous atmosphere created by the government could not be overcome by testimony of long term residents of the apartments and immediate neighbors that African-Americans had always lived at the complex and in consistent numbers, nor petitioner Dr. Dooley's and other former and current employees unqualified denial of any discriminatory policy, or that any policy of Petitioners had even changed as a result of the discrimination complaint. All of the events at issue occurred between October 18-20, 1994, at Oak Manor Apartments. It was undisputed that

Petitioners had only one application form in use and that no person would be considered to be eligible for an apartment and no apartment would be leased without the application first being fully completed and filled out and the required references being checked. It was also undisputed that no manager at any time had refused to provide an applicant an application on the basis of race.

In October, 1994, the resident manager at Oak Manor Apartments, Carol Ragan, was employed in that capacity from approximately August, 1994, until mid-November, 1994. During her employment, Ragan was stealing from the Petitioners and ultimately plead guilty to felony theft of property from Petitioners. Ragan harbored enormous personal animosity towards Elizabeth Dooley, appellant Dr. Dooley's former wife, as well as her daughter, Tricia Smith (now Turner), a low level employee of appellant Big D Enterprises, Inc., who would pick up the rent from the apartment managers and deliver forms and cleaning supplies. Ragan's animosity was clearly demonstrated when she quit this job without notice but left behind a note calling Elizabeth Dooley a "blood sucking slut".

On October 18, 1994, Richard Batts and Janet Poole, an unmarried black couple who had just been

evicted from an apartment complex because of loud noise, came to Oak Manor Apartments, looking for a two bedroom apartment. None of the apartments shown Batts/Poole were actually available for rent due to uncompleted maintenance work on those units. Batts/Poole did not fill out Petitioners' required application form, and did not leave a deposit nor sign any lease. Ragan testified that Tricia Smith told her Batts/Poole could not rent because they were black and Smith denied this. On October 19, 1994, Cynthia Parks (now Williams) was shown the same apartment as Batts/Poole the preceding day. The apartment was still not available to be rented as work still remained to be done. Williams did not fill out the required application form, and did not leave a deposit nor did she sign any lease. Williams took a Request for Inspection (RFI) form back to the local housing authority so that an HUD inspection of the apartment could be scheduled. Williams claimed said she told Ragan that she had a biracial child because she had trouble in the past because of it. Ragan denied that Williams told her anything about a biracial child but said that Tricia Smith somehow just "knew" that Williams had a biracial child and that she could not be rented to. Smith flatly denied this. On October 20, 1994, Williams returned to Oak Manor Apartments well after the rental office had closed for the afternoon, ostensibly to pay a deposit and pick up

her keys, and was told by Ragan she would not be rented to because of her references. Williams stated she did not fill out the only application form strictly used by the apartment complex, but claimed she filled out something else entirely. In any event, it was undisputed that Williams did not put down a street address where she was living and she intentionally left out any information about any employer or any source of income. The next day Ragan telephoned Williams to tell her the "truth", that Williams could not be rented to because of the race of her child. Williams then went to the local housing authority to make a complaint to HUD, thereby commencing the matter below.

ARGUMENT FOR GRANTING THE WRIT

The Court should grant certiorari for the reason that the Eighth Circuit has decided an important federal question in a way that conflicts with decisions of the Courts of Appeal of other circuits as well as conflicting with relevant decisions of this Court. Further, this Court should grant certiorari because the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and, finally, in the instant case, the Eighth Circuit has so far departed

from prior Eighth Circuit decisions so as to call for the exercise of this Court's supervisory power. For all of the foregoing reasons as amplified below, this Court should grant certiorari.

ARGUMENT 1

IS HOUSING DISCRIMINATION SO INHERENTLY REPREHENSIBLE THAT NO PUNITIVE DAMAGE AWARD BASED THEREUPON CAN EVER VIOLATE THE CONSTITUTIONAL FIFTH AMENDMENT GUARANTEES OF DUE PROCESS OF LAW?

The case below was a discrimination case in which the jury found the actual harm to be minimal - only $1000 spread across three aggrieved persons, but assessed enormous punitive damages of $100,000.

This Court last visited the issue of due process with respect to punitive damages in BMW of North America, Inc. vs. Gore, 116 S.Ct.1589, 134 L.Ed. 2d 809 (1996). In BMW, this Court expressly recognized that defendants have a substantive due process right against a grossly excessive punitive damage award. In BMW, plaintiff received only $4000.00 in compensatory damages but $4,000,000.00 in punitive damages (the latter of which the

Alabama Supreme Court remitted to $2,000,000.00) merely concerning the sale of a car. This Court reversed and remanded the awards holding that when a punitive damage award can fairly be characterized as being excessive in relation to the underlying interests sought to be vindicated, it enters the zone of arbitrariness that violates guarantees of due process. Id. at 822. This Court declared, at 826., that:

> "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."

This Court, in reversing the punitive damage award in BMW and declaring that it violated due process, stated and discussed that the jury and reviewing court could properly consider (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of compensatory damages to punitive damages, and (3) sanctions for comparable misconduct in determining whether or not a punitive damage award is constitutionally unreasonable. Id. at 826. This Court declared, "The principle that exemplary damages must bear a "reasonable relationship"

to compensatory damages has a long pedigree." Id. at 829. This Court, in further noting the prior decisions of Haslip 113 L. Ed. 2d 1 (1991)[1], and TXO Production vs. Alliance Resources 125 L.Ed. 2d 366 (1993)[2], endorsed the proposition that comparisons between the compensatory award of damages and the punitive award is absolutely

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In Pacific Mutual Life Insurance Co. vs. Haslip 113 L. Ed. 2d 1 (1991) this Court, although declining to adopt an exact ratio of actual damages to punitive damages above which punitive damages would be constitutionally proscribed and below which would be constitutionally tolerable, expressed its belief that a punitive damage award that was 4 times the amount of the compensatory damages awarded, was "close to the line" where a punitive damage award becomes unconstitutional. Id. at 23.

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In TXO, TXO embarked on a scheme to fraudulently obtain potentially millions of dollars of royalties from the rightful owners. The scheme did not work and the actual damages were thus low, but the Court allowed a very high $10,000,000.00 punitive damage award to stand. The Court, following dicta in Haslip, refined its analysis by concluding that a proper inquiry is whether there is a reasonable relationship between the punitive damages awarded and the harm likely to result from the defendant's conduct as well as the harm that actually occurred. The potential for economic loss to the plaintiff had defendant TXO's tortious plan succeeded was enormous, and was contended at trial to be between $5 million and $8.3 million. The Court suggested that even if the potential economic loss was only $1 million, under the egregious facts of TXO, the punitive damage award would be allowed to stand, suggesting that in an extreme case a ratio of punitive damages to actual harm to the plaintiff of up to as high as 10 to 1, might be permitted.

proper. Although this Court in BMW declined in that case to set forth a hard and fast bright line rule, it certainly did not make comparisons between compensatory and punitive damages subordinate to any other properly considered factors. Indeed, this Court approvingly cited TXO as suggesting that even where the potential harm to victims is enormous, and the defendant is enormously wealthy, as were the facts of TXO, the ratio of punitive versus actual damages should not be higher than 10 to 1. BMW, at 830.

Below, the Eighth Circuit, after acknowledging Haslip and TXO, merely gave lip service to this Court's decisions when it declared that:

> "Although the ratio of compensatory to punitive damages is not irrelevant, it is simply one factor that a Court must consider when evaluating whether a punitive damage award violated due process,"

and instead went on to focus exclusively on the perceived reprehensibility of the defendant's conduct and the maximum civil sanctions that may be allowed under the Fair Housing Act. The awards in the instant case, however, cannot be constitutionally salvaged under the rubric of reprehensibility, as that factor can never provide one "fair

notice ... of the severity of the penalty that a State may impose." BMW at 826.

In assessing the Eighth Circuit's reliance on reprehensibility, this Court must examine other recent decisions of the Eighth Circuit which the Eighth Circuit itself failed to acknowledge. Kimzey v. Wal-Mart Stores Inc., 107 F.3d 568 (8th Cir. 1997) is illustrative. During the four-and-one-half years Kimzey worked at Wal-Mart, she endured a constant barrage of demeaning and abusive comments, but her complaints to management were ignored and she resigned and sued. The jury awarded Kimzey $35,000 in compensatory damages, $1.00 for back pay, and a whopping $50 million in punitive damages which the district court remitted to $5 million. On appeal, the Eighth Circuit affirmed Wal-Mart's underlying liability on Kimzey's hostile work environment and constructive discharge claims and the submissibility of punitive damages, but ordered a further remittitur of the punitive award to $350,000. Id. In reducing the punitive damage award to 0.7% of the amount awarded by the jury, (a ten to one ratio to the actual damages) the Kimzey Court found mitigating circumstances in the modest actual damages assessed by the jury, and the nature of the harassing conduct in question. Id. On the "malice or outrageousness" scale, the conduct that the "aggrieved

persons" in the instant case complained of is no match for the physical and verbal abuse, insults and intimidation experienced under Kimzey, because of her gender, on a nearly daily basis at the same employer for over four years. In the present case, any racial discrimination experienced by these persons pales by comparison to that suffered by most discrimination plaintiffs. Never were these aggrieved persons physically or verbally assaulted or subjected to demeaning comments aimed at themselves or other African Americans. Indeed, they had to be told that they had been discriminated against well after the alleged occurrence. While the Eighth Circuit declared appellant's actions below "racism of the rawest sort" (while wholly ignoring that the alleged incidents of discrimination had occurred more than four year's previous and had not been repeated) it did nothing to address how it was somehow more culpable and should thus be punished more harshly than the four year campaign of sexism in its rawest form that was at issue in Kimzey. The Eighth Circuit simply ignored the principle that exemplary damages must bear a "reasonable relationship" to compensatory damages.

As if the disparity of the application of the applicable principles from Kimzey to the instant case were not enough to see the great variation in the application of the BMW principles from the Eighth Circuit to the Fifth

Circuit, this Court need look no further than the decision of Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 931 (5th Cir. 1996), cert. denied, 117 S. Ct. 767 (1997), an employment discrimination case. There the evidence was that the defendant had referred to black employees as "porch monkeys" and "niggers," considered them to be "shiftless" and "lazy," and said that "not another nigger is to be hired." African-Americans were scheduled on less desirable shifts and assigned menial tasks not required of white employees and the defendant falsified documents to create a paper trail of misconduct to justify firing the plaintiff. Id. at 942-43. The Fifth Circuit found that the quantum of the award did not comply with the factors set out by this Court to determine the reasonableness of a punitive damage award, citing BMW, and vacated the punitive damage award of $150,000 as excessive. As in the instant case, the Court found that the plaintiff was not personally subjected to verbal or physical abuse, and that the punitive damage assessment bore no "reasonable relationship" to the compensatory damage awards which Court found to be nominal emotional damage (as in the case at bar). The Fifth Circuit found a ratio of punitive to compensatory damages of approximately 6.5 to 1 unsustainable in light of this Court's recognition that a punitive damage award of 4 times the amount of compensatory damages was "close to the line" in terms of

constitutional propriety.

Likewise, the Seventh Circuit's view of a proper modicum of punitive damages is strikingly different from that of the Eighth Circuit in fair housing cases. In Littlefield vs. McGuffey, 954 F. 2d 1337 (7th Cir. 1992), an applicant alleged she was denied rental housing because of the race of her boyfriend and their daughter, and sued the landlord under the Fair Housing Act and for intentional infliction of emotional distress. After the landlord rented the apartment to the applicant, he realized that her boyfriend and their daughter were not of the same race as the applicant, and the landlord engaged in a series of egregious acts including death threats. The aggrieved person had suffered numerous episodes of severe emotional distress, disquiet and fright, physiological aliments and that she feared for her daughter's safety. The jury assessed an compensatory award of $50,000 and punitive damages of $100,000 which the Seventh Circuit affirmed.

The vast variation in damage awards in discrimination cases demonstrates that misplaced reliance on perceived reprehensibility clearly violates the fundamental principle this Court declared in BMW, at 826., that:

> "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."

Although this Court has declined to set a fixed ratio above which punitive damage awards are flatly unconstitutional, the Court has given specific guidance in the recent decisions in Haslip, TXO and BMW, noting, as it did in Haslip, that punitive damages of four times the actual damages where close to the line, and that ten times the actual harm, as expressed in TXO, was the upper limit that might pass constitutional scrutiny.

Here, the aggrieved persons alleged they had been discriminated against only after it had been brought to their attention sometime after the fact, and they all admitted that they had no actual, out-of-pocket damages. At most there was some minor degree of humiliation, and the jury found the total sum of compensatory damage to be served by an award of $1000. This equates to a finding by the jury that there was very little damages suffered by these aggrieved persons. The $100,000.00 award to the aggrieved persons when compared to the combined total actual damage award

of $1,000.00 produces a staggering ratio of 100:1. If the 4:1 ratio in Haslip was close to the line, the instant case has crossed it. Here, the ratio of punitive damages to actual damages is comparable to the "breathtaking" ratio in BMW, that the Court declared must raise a suspicious judicial eyebrow. Prior to the instant case, the most recent case of the Eighth Circuit dealing squarely with punitive damages was found in the decision of EEOC vs. HBE Corp., dba Adam's Mark Hotel, 135 F.3d 543 (8th Cir. 1998) which was decided January 27, 1998. In Adam's Mark, the appellants had been accused of racial discrimination in the discharge of one of its' managers, Helms, an African American, and against his supervisor for refusing to fire Helms. During the trial, testimony indicated it was the policy of the company to exclude African-Americans from important positions at the hotel. The jury awarded Helms $52,657 in compensatory damages and $3,800,000.000 in punitive damages. On appeal the hotel contended the amount of punitive damage was excessive and the Eighth Circuit agreed, stating: "the amount of any punitive damages awarded should be what is needed to punish and deter the defendant in addition to the compensatory award." The Court noted that the ratio of punitive to compensatory damages was very high (>72:1) and reduced the amount of punitive damages to $380,000 for Helms, or 7.2:1. Id. If the same principles were to be

applied consistently by the Eighth Circuit, than the appropriate damage figure under the authority of Adam's Mark, becomes a more reasonable $7200.00.

In the process of finding the $3,800,000 award in Adams Mark excessive, the Eighth Circuit also relied on the wealth of the defendants at hand, noting that the amount of punitive damages came to five percent of the corporate parent's net worth and found same "to be a very high ratio" and excessive. When the Court reduced the punitive damage award by a factor of 10, it necessarily reduced the confiscation to 0.5% of the companies's net worth, a sum that the Eighth Circuit presumably felt comfortable with. The jury's award of 3.3 percent of petitioner Big D's net worth (based upon $50,000.00 punitive damages and net worth of $1,514,530.00) and 2.42 percent of petitioner Dr. Dooley's net worth (based upon $50,000.00 punitive damages and net worth of $2,063,324) is far greater than necessary to sting Big D and Dr. Dooley and is excessive when compared to the net worth percentages approved as punitive damage awards in Adams Mark and Kimzey.[3] In Cash v. Beltmann North

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[3]Similarly, after appellate remittitur the punitive damage award in Kimzey was less than two one-thousandths of one percent (>0.002 %) of Wal-Mart's $32 billion net worth. Application of the same percentage to Big D's net worth would produce a punitive

American Co., 900 F.2d 109, 111 n. 3 (7th Cir. 1990), the court observed that a typical ratio for a punitive damage award to a defendant's net worth is about one percent. See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.), cert. denied, 478 U.S. 1022 (1986) (two defendants; award represented 0.027% of their respective net worth); Spaeth v. Union Oil Co., 762 F.2d 865 (10th Cir. 1985) (0.06% of net worth), cert. denied, 476 U.S. 1104 (1986); Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989) (0.81% of net worth);Bemer Aviation, Inc. v. Hughes Helicopter, Inc., 621 F. Supp. 290 (E.D. Pa. 1985) (0.21% of net worth), aff'd, 802 F.2d 445 (3d Cir. 1986); T.D.S., Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520 (11th Cir. 1985) (1.05% of net assets). Under the rationale of these decisions, as well as the prior decisions of the Eighth Circuit, the punitive assessment in this particular case is unconstitutionally confiscatory. In reducing the punitive damage awards in Kimzey and Adams Mark the Eighth Circuit was acting consistently with its prior decisions and those of other circuits. In allowing the instant award to stand, the Eighth Circuit has created conflict with decisions of the other Circuit Courts of Appeal as well as its own.

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figure of $302.90 and to Dr. Dooley's net worth would produce a figure of $412.66, for a total punitive award of $715.56.

ARGUMENT 2

MUST A DEFENDANT ENGAGE IN THE CUMULATIVE PROCEDURE OF RECALLING THE SAME WITNESSES TO ADDUCE ON DIRECT EXAMINATION THE SAME EVIDENCE THAT WAS ADDUCED ON CROSS EXAMINATION IN ORDER TO RECEIVE A MIXED MOTIVE JURY INSTRUCTION IN A DISCRIMINATION CASE?

Below, the petitioners requested a mixed motive jury instruction. The trial court, at the insistence of the government, withdrew a mixed motive instruction it had intended to give the jury, ostensibly for the reason that petitioners, in requesting a mixed motive instruction, were relying on evidence adduced from the cross examination of government witnesses and not on the basis of evidence adduced from witnesses called to testify by the petitioners.

In the decision of Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 268 (1989) Respondent Hopkins was a senior manager in a professional accounting partnership who was neither offered nor denied partnership, but instead had her candidacy held for reconsideration in a subsequent year. When she was not resubmitted for partnership, she sued

in the District Court under Title VII of the Civil Rights Act of 1964 charging discrimination against on the basis of sex. This Court held that :

> "(O)nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights." Price Waterhouse, 1989.SCT.2132, P. 39.

The Price Waterhouse Court went on to say:

> "The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already had made this showing by convincing Judge Gesell that Hopkin's interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision."

> The Trial Court stated its opinion that the Price Waterhouse reasoning did apply in housing discrimination cases and petitioners believe the facts of the instant case are precisely the type of case that the Court in Price Waterhouse had in mind.

Below, Defendants' Exhibit 1 was a copy of the only Rental Application form used and relied upon by the appellants in reviewing a prospective applicant. Without exception, each of the Government's witnesses testified under cross examination that this Rental Application form was the only rental application form in use and that it was required to be fully completed by an applicant before they would be considered eligible for an apartment.

The cross examination testimony of Williams was that she did not fill out the Exhibit 1 Rental Application. She was shown the Exhibit 1 Rental Application and testified that she was certain that she did not fill out that application. The cross examination testimony of Batts was that he could not identify Exhibit 1 as the application for rental because he didn't see any application. Likewise, the cross examination testimony of Poole was that she could not identify the Exhibit 1 Rental Application, and she was certain that she did not fill out that particular type of form.

From the cross examination testimony of the government's own witnesses, which included prior apartment managers as well as Ragan, the manager employed when Williams, Poole and Batts claim to have sought petitioners apartment, it was uncontroverted that the Exhibit 1 Rental Application was the one and only Rental Application in use by the petitioners. It was uncontroverted from the cross examination testimony of the government's own witnesses that a completed application had to be obtained from a prospective applicant before the applicant could even be considered for a rental. From the cross examination testimony of the governments own witnesses, it was uncontroverted that none of the aggrieved persons in the case at Bar completed the application. Under cross examination, Ragan acknowledged that she initially told Williams that she was denied because her credit references "didn't check out" a reason that was clearly not racially based or motivated and was consistent with the evidence. Only later did she offer that an impermissible reason might have formed the basis for the aggrieved person's failure to obtain an apartment.

In upholding the trial court's refusal to give the mixed motive instruction, the Eighth Circuit has misapprehended the law. The Eighth circuit wrote that:

> "Dr. Dooley and Big D offered no witnesses to explain Oak Manor's policy regarding the proper completion of housing applications, and no witness corroborated appellants' allegation that deficiencies in Williams' housing application contributed to her rejection." Appendix, a13.

Implicit in the Eighth Circuit's Ruling upholding the trial court is the proposition that petitioners must have recalled the exact same government witnesses to adduce from them the exact same evidence on petitioners direct examination that had just been elicited from them on petitioner's cross examination. No authority is cited for this proposition by the Eighth Circuit and none is known by petitioners to exist. Indeed, such a procedure would seem to be flatly barred by Federal rule of Evidence 403 which declares in its pertinent part that evidence, even if relevant, can be excluded if cumulative in nature. Certainly recalling the same witnesses to say the same things is the ultimate in cumulation of testimony and unlikely to be permitted by any Court, nor is same a sound trial tactic to practice in front of a jury.

ARGUMENT 3

DOES STATE COMMON LAW CONTROL THE ASSESSMENT OF PUNITIVE DAMAGES AVAILABLE UNDER FEDERAL ACTS THAT SPECIFICALLY OMIT A FEDERAL PROCEDURE FOR THE ASSESSMENT OF SUCH DAMAGES?

While allowing for punitive damages, the Fair Housing Act does not provide any specific procedure for the assessment of punitive damages. Other circuits have declared that where Federal law does not set forth a specific procedure for assessing punitive damages, the court should look to the common law of the state in which it sits. McFadden v. Sanchez, 710 F. 2d 907 (2nd Cir. 1983). Although McFadden is a §1983 case, its principals are applicable to Title VIII claims. Accordingly, petitioners contend the law of Arkansas must be followed in the presentation of evidence pertinent to a punitive damage award when sought against multiple defendants.

Formerly, Arkansas did not permit punitive damages to be assessed against joint tort feasors. Dunaway vs. Troutt, 232 Ark. 615, 339 S.W.2d 613 (1960). This rule was modified to permit joint tort feasors to be held jointly and severally liable for punitive damages, however,

evidence of the individual wealth or financial condition of each defendant is not admissible on the basis that one defendant should not be punished based upon the wealth of another defendant. Arkansas common law strictly holds that introduction of financial worth in a case where punitive damages are sought against multiple joint tort feasors constitutes reversible error. Life & Cas. Ins. Co. of Tenn. vs. Padgett, 241 Ark. 353, 407 S.W.2d 728 (1966). Padgett states that in law cases, the issues of punitive and compensatory damages may be so interwoven that an error with respect to one requires a retrial of the whole case, citing Mowery v. House, 234 Ark. 878, 355 S.W.2d 275 (1962). At trial below, the petitioners timely objected to the introduction of evidence reflecting financial condition of the appellants, but such objection was overruled. As there was a substantial difference of net assets between petitioners but identical punitive verdicts, it is difficult to imagine a more prejudicial error than submission of the financial information of each of the petitioners to the jury.

The Eighth Circuit opinion asserts it is not appropriate to apply state law in this context on the basis that to allow the application of state law to the assessment of punitive damages under the FHA would yield

inconsistent results between the states and thwart the evenhanded application of the FHA's anti-discrimination provisions. Appendix, a14 - a15. In support of this assertion, the court cited the decision of Kamen vs. Kemper Fin.Servs., Inc., 500 U.S. 90, 98 (1991). However, Kamen sets forth the presumption that state law should be incorporated into federal common law and that federal courts should actually seek to incorporate the state law as the federal rule of decision unless application of the particular state law in question would frustrate specific objectives of the federal programs. Id at 98.

In this context, Arkansas law is actually in harmony with the FHA by insuring the evenhanded application of the act applies not just to plaintiffs but also to defendants, so that one defendant is not unjustly punished because of the wealth of another. To suggest that the Arkansas law which restricts the introduction of financial information of multiple defendants when punitive damages are sought against multiple defendants somehow produces inconsistent results between the states is sheer speculation. Had Congress been concerned about the possibility of inconsistent results between states as the Eighth Circuit believed, it would have provided a statutory framework for

assessment of punitive damages in the FHA. The application of state law, therefore, is not only appropriate but expected.

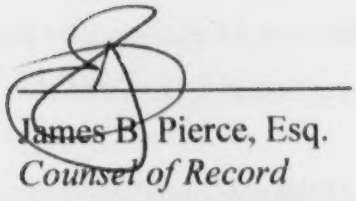
CONCLUSION

In the case at Bar the ratio of punitive damages to actual damages is comparable to the "breathtaking" ratio in BMW that this Court declared must raise a suspicious judicial eyebrow. Under the rationale of prior decisions of the Eighth Circuit, the punitive assessment in this particular case is unconstitutionally confiscatory. In allowing the instant award to stand, the Eighth Circuit has created conflict not only with its prior decisions, it has created conflict with decisions of the other Circuit Courts of Appeal which this Court should remedy by granting certiorari.

Implicit in the opinion of the Eighth Circuit that a mixed motive instruction was properly not given in the trial court is the proposition that petitioners must have recalled the exact same government witnesses to adduce from them the exact same evidence on petitioners direct examination that had just been elicited from them on

petitioner's cross examination. Such proposition is unprecedented and in direct conflict with common sense and Federal Rule of Evidence 403 generally barring introduction of cumulative testimony. This Court should grant certiorari to resolve this issue

Federal courts should seek to incorporate state law as the federal rule of decision unless application of the particular state law in question would frustrate specific objectives of the federal programs. In the case at Bar, Arkansas law which restricts the introduction of financial information of multiple defendants when punitive damages are sought against multiple defendants frustrates no objective of the Fair Housing Act and should have been followed with respect to the assessment of punitive damages. This Court should grant certiorari to clarify this interstice of the Fair Housing Act.



James B. Pierce, Esq.
Counsel of Record

Post Office Box 1604
Fort Smith, Arkansas 72902
Telephone (501)785-5313

Edwin G. Dooley, Jr., Esq.
Post Office Box 1604
Fort Smith, Arkansas 72902
Telephone (501)785-5313

Attorneys for Petitioners

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 98-2861

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States District Court

v.	*	for the Western District
	*	of Arkansas
Big D Enterprises, Inc.,	*	
Dr. Edwin G. Dooley,	*	
Appellants.	*	

Submitted: March 10, 1999
Filed: July 9, 1999

Before RICHARD S. ARNOLD, FLOYD R. GIBSON, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Following a trial in district court[1], a twelve-person jury found that Big D Enterprises, Inc., and Dr. Edwin G. Dooley (collectively appellants) violated the Fair Housing

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[1] The Honorable H. Franklin Waters, United States District Judge for the Western District of Arkansas, presiding.

Act (FHA) when they denied rental housing, to applicants based on race. The jury awarded $1,000 in compensatory damages and $100,000 in punitive damages to three victims of appellants discrimination. Big D Enterprises and Dr. Dooley appeal. We affirm.

I.
FACTS

Dr. Dooley owns three apartment complexes in Fort Smith, Arkansas. Dr. Dooley is also the president, sole officer, and sole shareholder of a corporation known as Big D Enterprises which manages the three apartment complexes, one of which is called Oak Manor. In October 1994, Richard Batts and Janet Poole sought to rent a two-bedroom apartment at Oak Manor. Cynthia Williams also sought to rent an apartment at Oak Manor. Although one of Big D's property managers, Carol Ragan, initially told Batts, Poole, and Williams that one or more apartments were available, all three applicants were later denied an opportunity to rent an apartment at Oak Manor. The rejection of Batts and Poole's and Williams' rental applications occurred after Big D executives discovered the race of the prospective tenants. Both Batts and Poole

are black. Williams is white, but she is the mother of a biracial child. Big D later rented the apartment that Batts, Poole, and Williams were seeking to a white man.

Following the denial of her rental application, Williams filed a complaint with the United States Department of Housing and Urban Development (HUD) in which she alleged that Big D denied her housing based upon the race of her son. Ragan also filed a complaint with HUD in which she averred that Big D denied Batts and Poole an opportunity to rent at Oak Manor pursuant to Dr. Dooley's personal policy that forbade property managers from renting to black applicants. Ragan also informed HUD that Big D refused to rent to Williams because she is the mother of a biracial child and her ex-husband is black.

After investigating Ragan's and Williams' complaints, HUD found that appellants' acts of impermissible discrimination were not limited to Batts, Poole, and Williams. Rather, HUD determined that Big D and Dr. Dooley engaged in a pattern and practice of discriminating against minority housing applicants. The agency found that Dr. Dooley, his ex-wife, Elizabeth, and his stepdaughter, Tricia Turner, intentionally violated the Fair Housing Act, 42 U.S.C. §§3601-3631 (1994), when they ordered Big D property managers not to rent to

prospective black tenants.

Upon completion of HUD's investigation, the Civil Rights Division of the United States Department of Justice (government) filed the instant action in district court against the appellants on behalf of Batts, Poole, and Williams. A trial ensued. Throughout the trial, Dr. Dooley continued to deny that he or Big D ever discriminated against a housing applicant based on the applicant's race. The jury rejected Dr. Dooley's denial defense and awarded damages to the three aggrieved applicants. Appellants moved for judgment as a matter of law, a new trial, or a remittitur of the punitive damage award. The district court denied appellants' motion in full and they now appeal.

On appeal, appellants contend that the jury's verdict contravenes the weight of the evidence, insufficient evidence exists to support the jury's verdict, the district court should have given a mixed motive instruction, the punitive damage award is excessive in relation to the compensatory damage award, the district court erred when it excluded certain evidence, the action is barred by the statute of limitations, and the district court abused its discretion when it sanctioned appellants for failure to comply with discovery orders.

II.
DISCUSSION

A.

Sufficiency and Weight of the Evidence

Appellants contend that the jury's verdict contradicts the weight of the evidence. They argue that the majority of the evidence introduced at trial supports their position that they did not discriminate against black applicants. Appellants also assert that the government failed to show by sufficient evidence that either Dr. Dooley or Big D engaged in a pattern or practice of impermissible discrimination as defined by the FHA. Appellants' assertions lack merit.

A party seeking to obtain a new trial based upon the weight of the evidence or a posttrial judgment as a matter of law based on the sufficiency of the evidence faces an onerous burden. We conduct de novo review of a district court's decision to deny a motion for judgment as a matter of law based on sufficiency of the evidence. See Denesha v. Farmers Ins. Exch., 161 F.3d 491, 497 (8th Cir. 1998),

cert. denied, 119 S. Ct. 1763 (1999). In conducting our review, we view the evidence in a light most favorable to the verdict and we will not reverse a jury's determinations unless we find "that no reasonable juror could have returned a verdict for the non-moving party." Rockwood Bank v. Gaia, 170 F.3d 833, 840-41 (8th Cir. 1999) (internal quotations omitted). In addition, we must (1) evaluate the evidence in a light most favorable to the nonmoving party; (2) assume that all conflicts were resolved in the nonmoving party's favor; (3) assume as proved all facts tended to be proven by the nonmoving party's evidence; (4) give the nonmoving party the benefit of all reasonable inferences that may be be gleaned from the proved set of facts; and (5) affirm the district court unless the evidence conclusively favors the moving party and is susceptible to no reasonable inference that will sustain the nonmoving party's position. See id. at 841 .

In contrast, we review a district court's decision to deny a motion for a new trial based upon the weight of the evidence under an abuse of discretion standard. See Pulla v. Amoco Oil Co., 72 F.3d 648, 656-57 (8th Cir. 1995). Hence, we will not disturb a district court's decision to deny a motion for a new trial unless we find that the jury's

verdict contravenes the great weight of the evidence to such an extent that allowing the verdict to stand will result in a miscarriage of justice. See Denesha, 161 F.3d at 497.

Proving a practice or pattern of discrimination requires the government to show that the defendant engaged in discriminatory activity as a matter of standard operating procedure. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). Isolated or sporadic acts of discrimination are insufficient to prove a pattern or practice under the FHA.. See United States v. Balistrieri,, 981 F.2d 916, 929 (7th Cir. 1992), cert. denied 5 1 0 U.S. 812 (1993).

In this case, the government has more than satisfied its burden of proof. Several of Dr. Dooley's apartment managers testified that Dr. Dooley personally instructed them not to rent to black applicants or - as Dr. Dooley referred to black applicants - "niggers." Some of the managers testified that, initially, they unwittingly rented to black applicants. When Dr. Dooley discovered his employees' actions, however, he angrily ordered them to tell black apartment seekers that no vacancies existed. Pursuant to Dr. Dooley's directives, the Big D employees

repeatedly lied to black applicants who inquired about the availability of an apartment.

The managers testified that Dr. Dooley's ex-wife and stepdaughter often supervised their assignment of apartments in order to ensure that Dr. Dooley's exclusionary plans were implemented. In addition to Dr. Dooley, Elizabeth Dooley and Tricia Turner frequently referred to black people as "niggers" and vigilantly enforced Big D's "no blacks allowed" policy. Elizabeth Dooley explicitly told one manager not to rent to black people, anyone with a "raggedy" car[,] or Vietnamese that looked like they couldn't pay the rent." (Trial Tr. Vol. 1, at 246.) Elizabeth Dooley told another manager that "she did not want any niggers or people that had ugly cars" or "anyone that was handicapped [who would] drag[] their feet across and ruin her carpet." (Trial Tr. Vol. 2, at 580.) Following Dr. Dooley's orders, managers utilized staff meetings to communicate the Dooley family's goal of excluding black applicants in an effort to "clean the place up and get a better class of people." (Trial Tr. Vol. 1, at 178.)

When Richard Batts and Janet Poole initially applied

for an apartment at Oak Manor, Carol Ragan testified that she was inclined to rent an apartment to them despite Dr. Dooley's orders. Ragan explained that Batts and Poole earned a combined income of $1,400 a month, and she believed that the couple would keep the apartment clean. When Ragan asked Tricia Turner for permission to rent to Batts and Poole, Turner responded by emphatically declaring, "No, no niggers whatsoever." (Trial Tr. Vol. 2, at 582).

Appellants' targeted discrimination extended beyond Batts and Poole. When Cynthia Williams applied to rent an apartment from Big D, she told Carol Ragan that she was the mother of a biracial child. Ragan responded by indicating that a biracial child may present a problem for the Dooleys. Ragan initially told Williams that a vacancy existed, and Williams began the process of relocating to Oak Manor. When Williams attempted to pay her deposit and obtain her key, Ragan and Dr. Dooley greeted her in the Oak Manor parking lot. Ragan informed Williams that Big D denied her application due to deficiencies in her credit history. The following day, however, Ragan explained to Williams that the actual reason for the denial of her application was the race of

her child. Ragan stated that when she asked Turner about the possibility of renting to a white woman who is the mother of a biracial child, Turner responded by saying that she did not want a black child living at Oak Manor, and she did not want Williams' black ex-husband "hanging around." (Trial Tr. Vol. 2, at 584.)

Taking the evidence of the discrimination leveled against the three identified victims together with the testimony of the Big D employees, it is apparent that the government conclusively demonstrated a pattern and practice of discrimination against black housing applicants. Appellants argue, however, that we should disregard most of the government's evidence because the government's testifying witnesses lacked credibility. In particular, appellants assail the character of Carol Ragan by labeling her a convicted felon and a person who bore "enormous personal animosity" toward Elizabeth Dooley. (Appellants' Br. at 15.) Appellants casually remark in their brief that "Ragan quit and left a note calling Elizabeth Dooley a blood sucking slut." (Appellants' Br. at 2.) Appellants' attack on the character of the government's testifying witnesses not only is irrelevant, it demonstrates a panoptic misunderstanding of the role

of an appellate court in evaluating the sufficiency of the evidence. Appellate courts do not weigh the credibility of witnesses. See Triton Corp. v. Hardrives, Inc., 85 F.3d 343, 345 (8th Cir. 1996). The jury is the sole arbiter of the truthfulness or believability of a witness's testimony. See Morse v. Southern Union Co. No. 98-2050, 1999 WL 212 844, at * 3 (8th Cir. Apr. 14, 1999). The jury also determines what weight to assign to a particular witness's testimony. See id. This court's role is limited to determining if there is sufficient evidence to support the jury's verdict and if the jury's verdict contradicts the great weight of the evidence. See Denesha, 161 F.3d at 497. As we previously stated, the evidence is more than sufficient in this case. In fact, overwhelming evidence exists to support the jury's verdict. Accordingly, appellants' challenge to the sufficiency and weight of the evidence fails. The district court committed no error in denying the appellants' post-trial motions for judgment as a matter of law or for a new trial.

B.

Mixed Motive Instruction

Appellants argue that the district court erred when it refused to grant their request for a mixed motive jury instruction. Specifically, appellants argue that they denied Cynthia Williams an opportunity to rent an apartment because she did not complete her housing application correctly. Appellants claim that the jury should have been able to consider whether the faulty application was the actual reason for Big D's rejection of Williams. [2] We review a district court's decision regarding jury instructions for abuse of discretion. See Morse, 1999 WL 212844, at *7.

Under a mixed motive analysis, a defendant must present sufficient evidence for a jury to conclude that the

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[2] Appellants argue on appeal that they should be entitled to a mixed motive instruction regarding the denial of Batts and Poole's application. Appellants contend that Batts and Poole also failed to complete correctly their housing application. Appellants assert that the failure to complete the application in a proper manner served as a legitimate basis for the denial of housing to Batts and Poole. We note, however, that appellants did not raise the issue of Batts and Poole's application before the district court. We decline to address issues raised for the first time on appeal. See Carter v. Chasler Corp., 173 F.3d 693, 704 n.9 (8th Cir. 1999). Hence, appellants' mixed motive arguments with respect to Batts and Poole must fail.

defendants adverse actions against the plaintiff were motivated by a legitimate reason. See Price Waterhouse v. Hopkins, 490 U.S. 228,252 (1989) (plurality). When evidence of permissible and impermissible motives are present, a defendant will be held liable unless it can show that it would have taken the same action against the plaintiff regardless of the improper motive. See id.:Kris v. Sprint Communications Co., Ltd. Partnership, 58 F.3d 1276, 1280 (8th Cir. 1995). Submission of a mixed motive jury instruction is not warranted if a defendant has failed to present sufficient evidence of a legitimate motive for the adverse decision. See Buchholz v. Rockwell Int'l. Corp., 120 F.3d 146, 149 (8th Cir. 1997).

Dr. Dooley and Big D failed to provide sufficient evidence of a legitimate motive in this case. Appellants assert that application deficiencies served as the legitimate reason for the denial of Williams housing application. Appellants ' assertion is not supported by the record. Williams testified that she remembers filling out Big D's housing application form,, but she does not recall whether she completed all the items contained on the form. Such a statement hardly constitutes sufficient evidence that Williams' application was deficient or that

a deficiency played any role in the decision to deny her housing at Oak Manor. Dr. Dooley and Big D offered no witnesses to explain Oak Manor's policy regarding the proper completion of housing applications, and no witness corroborated appellants' allegation that deficiencies in Williams' housing application contributed to her rejection. Appellants' naked assertion without more is not sufficient evidence of a legally permissible motive. Accordingly, the district court properly denied appellants' request for a mixed motive jury instruction.

C.

Punitive Damages

Appellants contend that the district court erred when it declined to apply Arkansas law as the mechanism for assessing punitive damages under the FHA. Appellants further contend that the district court contravened Arkansas law when it permitted the government to introduce evidence of the net worth of both Big D and Dr. Dooley for the purpose of calculating punitive damages. We review de novo a district court's conclusions regarding choice of law. See

American Home Assur. Co. v. L & L Marine Serv., Inc., 153 F.3d 616, 618 (8th Cir. 1998).

The cause of action in this case arises from the FHA. The FHA is a federal act allowing for the assessment of punitive damages against persons who engage in housing discrimination. See 42 U.S.C. §3613(c)(1)(1994). When a federal statute provides a remedy, the scope of the remedy is interpreted in accordance with federal law. See Burnett v. Grattan, 468 U.S. 42, 55 n. 18 (1984). Appellants argue, however, that there is a difference between the scope of the remedy and the assessment of that remedy. Even assuming, without deciding, that appellants have correctly identified an interstice in the punitive damage provision of the FHA, it is not appropriate to apply state law in this context. The application of state law to the assessment of punitive damages under the FHA would yield inconsistent results between the states and thwart the even-handed application of the FHA's anti-discrimination provisions. Cf. Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) (noting that filling the interstices of federal remedial schemes with state common law is not appropriate when a uniform national standard is needed

or application of state law would frustrate a federal program's specific objectives). Hence, the assessment of punitive damages under the FHA is governed by federal rather than state law. Under federal law, evidence of a defendant's financial worth is traditionally admissible for the purpose of evaluating the amount of punitive damages that should be awarded. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981). Therefore, we find no error.

Appellants also claim that the district court erred in denying their motion to remit the punitive damage award. Appellants characterize the award as "grossly excessive" and claim that it violates their due process rights under the United States Constitution. The district court concluded that the award comports with due process. We review the district court's conclusions de novo. See Midland Banana & Tomato Co., Inc. v. United States Dep't of Agric., 104 F.3d 139, 142 (8th Cir.), cert. denied, 118 S. Ct. 372 (1997).

Appellants premise their due process challenge primarily on the ratio of the punitive damage award to the compensatory damage award. The jury awarded Cynthia

Williams a total of $500 in compensatory damages against both defendants. The jury awarded Williams $25,000 in punitive damages against Dr. Dooley and $25,000 in punitive damages against Big D. The jury also awarded Batts and Poole, collectively, a total of $500 in compensatory damages against both defendants. Batts and Poole, collectively, also received a $25,000 punitive damage award against Dr. Dooley and a $25,000 punitive damage award against Big D. Appellants argue that aggregating the punitive and compensatory damage awards yields a ratio of 100 to 1. Relying on Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), appellants contend that an award in excess of a 4 to 1 ratio violates substantive due process. Once again, appellants misconstrue the applicable law.

Consistent with the Supreme Court, we eschew facile reliance on mathematical formulas for determining the appropriateness of punitive damage awards. See BMW of N. Am, Inc. v. Gore, 517 U.S. 559, 582 (1996). Although the ratio of compensatory to punitive damages is not irrelevant, it is simply one factor that a court must consider when evaluating whether a punitive damage award violates due process. See id. at 582-83. Courts

must also consider the reprehensibility of the defendants' misconduct and the extent to which the punitive damage award varies from the range of possible sanctions that may be imposed for comparable misconduct. See id. at 575, 583-84. The relative strength or weakness of the other factors naturally impacts upon the acceptability of the punitive to compensatory damage award ratio. In cases where the other factors are weak, a 4 to 1 ratio may test the outer limits of acceptability. See Haslip, 499 U.S. at 23. In cases where the other factors are strong, a 526 to 1 ratio may be appropriate. See TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 459-62 (1993); see also Dean v. Olibas, 129 F.3d 1001, 1007-08 (8th Cir. 1997) (upholding a 14 to 1 punitive to compensatory damages ratio).

In this case, the overall strength of the BMW factors justifies the punitive damage award. In terms of the similarity between the punitive damage award and the penalties available for comparable misconduct, we need look no further than the FHA itself. The FHA allows courts to impose a fine in addition to compensatory and punitive damages for violations of the act. The maximum fine permitted for a first time offense is $50,000. See 42

U.S.C. § 3614(d)(1)(C)(i). The total punitive damage award imposed against each defendant in this case was $50,000. The fact that the FHA permits courts to impose a fine up to $50,000 in addition to compensatory and punitive damages significantly undercuts appellants' argument that the punitive damage award in this case is excessive. Cf. Haslip, 499 U.S. at 23 (upholding a punitive damage award even though it far exceeded the statutory fine limit). We note that the district court declined to impose a fine because the jury had returned the amount of punitive damages it did.

Appellants' argument is also significantly undercut by the remaining BMW factor. The Supreme Court identified the degree of reprehensibility of the defendants' conduct as perhaps the most important factor that courts should consider when evaluating whether a punitive damage award comports with due process. See BMW, 517 U.S. at 575. In this case, the reprehensibility of appellants' conduct more than justifies the punitive damage award. Characterizing Big D and Dr. Dooley's actions as egregious may be an understatement. Big D and Dr. Dooley directly engaged in the systematic and deliberate exclusion of an entire race of people. Such

action exemplifies racism in its rawest form. Appellants' acts of intentional racial discrimination demonstrate that this society's goal of providing housing free of racial bias has yet to be achieved. Punitive damage awards help ensure that citizens who engage in such contemptible behavior against other citizens receive society's full rebuke and condemnation. The punitive damage award in this case promotes such an outcome and reinforces the nation's commitment to protecting and preserving the civil rights of all. Accordingly, after evaluating the BMW guidepost factors as a whole, we conclude that the district court committed no error in denying appellants' request for remittitur. The punitive damages stand.

D.

Evidentiary Exclusions

Appellants contend that the district court erred when it excluded some of their proffered evidence. Specifically, the district court denied appellants' requests to admit evidence of an administrative determination, a pamphlet distributed by the government, and the testimony of a witness identified for the first time at trial.

We review a district court's decision regarding admissibility of evidence for clear abuse of discretion. See Spencer v. Stuart Hall Co., Inc., No. 98-1832, 1999 WL 199423, at* 5 (8th Cir. Apr. 12, 1999).

Appellants' first evidentiary challenge concerns the district court's decision to exclude evidence of a HUD administrative determination. The administrative determination emanates from a complaint filed in 1996 by an interracial couple against Big D. The couple resided at Oak Manor and claimed disparate treatment based on their race. [3] HUD reviewed the couple's complaint and found "no cause" for further action against Big D or Dr. Dooley. Appellants argue that HUD's "no cause" finding constitutes probative evidence of an absence of discrimination in this case. Appellants' argument strains logic. The couple did not file their complaint against appellants until two years after the culmination of the acts that form the basis for the pattern and practice of discrimination alleged in the instant case.

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[3] The government claims that following Cynthia Williams' complaint with HUD, appellants retreated from their "no blacks allowed" policy in an effort to camouflage their prior acts of discrimination.

Hence, the administrative determination that resulted from the couple's complaint not only is irrelevant to the instant case, its admission poses a danger of confusion and undue prejudice. See United States v. Noske, 117 F.3d 1053, 1058 (8th Cir.), cert. denied, 118 S. Ct. 315 (1997), and 118 S. Ct. 389 (1997), and 118 S. Ct. 1060 (1998). Accordingly, the district court acted properly by excluding such evidence.

Next, appellants challenge the district court's decision to exclude an investigatory pamphlet distributed by the government. During the discovery phase of this case, the government circulated a pamphlet in an attempt to seek further information about appellants' pattern and practice of housing discrimination. The government's pamphlet garnered no response. Appellants argue that the absence of a response signals an absence of discrimination. We disagree. The absence of a response to the government's inquiry hardly proves that appellants did not engage in a pattern and practice of discrimination. Rather, the absence of a response indicates only that the government could not locate any additional witnesses who were willing to provide further information against Big D or Dr. Dooley. It does not disprove the

government's assertion of housing discrimination. Any minimal benefit that such evidence may inure to appellants is far outweighed by the potential for confusion and prejudice. See Fed. R. Evid. 403; Noske, 117 F.3d at 1058. Therefore, the district court did not abuse its discretion by excluding the evidence.

Appellants' final evidentiary challenge involves the district court's decision to disallow the testimony of a "newly discovered" witness. During the trial, appellants' attorney's wife remembered the name of an individual who, she claims, could testify that he saw biracial children living at Oak Manor. The district court declined to permit the individual's testimony. The district court committed no error.

It is a well-established rule in this circuit that district courts have broad discretion to exclude the testimony of a witness who was not disclosed prior to trial. See Blue v. Rose, 786 F.2d 349, 351 (8th Cir. 1986); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897-98 (8th Cir. 1978). In this case, the district court found that allowing the testimony of the witness would be unfairly prejudicial to the government.

We agree. We also note that, notwithstanding counsel's wife's late remembrance, appellants have not provided a compelling reason for not listing the potential witness prior to trial. Finally, we believe that the substance of the proposed testimony is merely cumulative evidence. Multiple witnesses testified in support of appellants' contention that they did not engage in a pattern and practice of racial discrimination. In view of the strength of the evidence against Big D and Dr. Dooley, it is rather implausible to suggest that the testimony of one additional defense witness would be outcome determinative. On more than one occasion, we have upheld a district court's decision to disallow the testimony of an eleventh-hour rebuttal witness. See Sterkel v. Fruehauf Corp., 975 F.2d 528, 532 (8th Cir. 1992); Blue, 786 F.2d at 351; Admiral Theatre, 585 F.2d at 897-98. We find no reason to disturb the district court's decision to exclude the testimony of a cumulative defense witness proffered well past the stroke of midnight.

E.

Statute of Limitations

Appellants argue that the government's claim is barred by the statute of limitations. Appellants failed to raise the statute of limitations argument until their posttrial motion for remittitur. A defense based upon the statute of limitations is generally waived if not raised in a responsive pleading. See Fed. R. Civ. P. 8(c); Myers v. John Deere Ltd., 683 F.2d 270, 273 (8th Cir. 1982). Appellants offer no plausible justification for their failure to raise the statute of limitations defense in a responsive pleading. Accordingly, we agree with the district court's conclusion that appellants waived any statute of limitations defense they may have had.

F.

Discovery Sanction

Appellants assert that the district court erred when it awarded the government attorney's fees and costs in the amount of $1,899 in conjunction with the government's discovery motion. The district court assessed attorney's fees and costs against Big D and Dr. Dooley, jointly, based upon their failure to produce documents and respond to the government's discovery requests. See Fed. R. Civ. P. 37. The district court reached the $1,899

figure after calculating, at a rate of $125 per hour, the total number of hours that the government's attorneys spent preparing their discovery motion, combined with expenses associated with legal database research. The district court found that a rate of $125 per hour appropriately represents the government attorney's experience and the local market rates. Appellants contend that the district court incorrectly determined the hourly rate.

Federal Rule of Civil Procedure 37 grants a district court wide discretion to impose sanctions for a party's failure to comply with discovery requests, and we will not reverse a district court's order with respect to sanctions, absent a clear abuse of discretion. See Collins v. Burg, 169 F.3d 563, 565 (8th Cir. 1999). "We are especially reluctant to substitute our judgment for that of the district court in the matter of appropriate attorney's fees, because the district court is in the best position to determine whether hours were reasonably expended and whether an attorney's hourly rates are reasonable within the context of the relevant community." Id.

Appellants argue that the district court's

determination of the hourly rate is unreasonable. Appellants contend that a district court should calculate the hourly rate in accordance with the value that the government places on its attorney's time. Appellants assert that an hourly rate of $125 for 15 hours of time "scales to an annual salary of $260,000 for a staff employee of the Justice Department." (Appellants' Br. at 48). Appellants' argument makes scant sense. It is axiomatic that attorney billing rates do not correlate with annual salary because an attorney's billing rate is designed to cover more than the attorney's net income expectations. Moreover, we have long recognized that the hourly rate of the local legal community may serve as a benchmark for determining the amount of attorney's fees to be imposed upon a party. See Moore v. City of Des Moines, 766 F.2d 343, 346 (8th Cir. 1985), cert. denied, 474 U.S. 1060 (1986). We see no reason why the government should not be able to recover a reasonable fee for its attorney's work calculated at the same rate that the attorney would be compensated by the prevailing local economy. In examining the hourly rate of the local legal community, it is irrelevant whether counsel seeking the attorney's fees is employed by the private or public sector. What matters is the attorney's experience and ability. We find that the district court committed no error

in its sanction award.

III.

CONCLUSION

For the reasons stated herein, we affirm the judgment of the district court.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2861WAFS

United States of America,

*

Appellee, *

* Appeal from the United

v. * States District Court for

* the Western District of

Big D Enterprises, Inc., Arkansas
Edwin G. Dooley, Dr.,
doing business as Oak
Manor Apartments, *

Appellants, *

*

Carol Ragan *

Defendant, *

*

Housing Authority, of

the City of Fort Smith*

Movant. *

JUDGMENT

This appeal from the United States District Court was submitted on the record of the District Court, briefs of the parties and was argued by counsel.

Afer consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

July 9, 1999

A true copy.

Attest: (s) Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2861WAFS

United States of America,

*

Appellee,

* Order Denying Petition for

v. * Rehearing and for

* Rehearing En Banc

Big D Enterprises, Inc., et. al.

*

Appellants.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

September 10, 1999

Order Entered at the Direction of the Court:

(S) Michael E. Gans

APPENDIX D

Trial Court Proposed Instruction 9

Instruction No. 9 read as follows:

"If you find in favor of the United States under Instruction No. 8, then you must answer the following question in the Interrogatories: Has it been proved by a preponderance of the evidence that defendants would have made the same decision not to rent to Cynthia Parks regardless of her son's race?"